IN THE

Supreme Court of the United States

No. 76-1155

GARY WAYNE BERZONSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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..... Term, 1976

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gary Wayne Berzonski, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on January 12, 1977 and the order denying the petition for Rehearing dated January 31, 1977.

Opinions Below

The Opinion of the District Court denying the Post-Trial Motions is not reported and is reprinted into Appendix A. The Opinion of the Court of Appeals is not yet reported and is reprinted in Appendix B, *infra.*

Jurisdiction

The Judgment Order of the United States Court of Appeals for the Third Circuit (Appendix A) was entered on January

12, 1977. A timely Petition for Rehearing was denied on January 31, 1977 (Appendix C). Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the Court of Appeals' final order.

Jurisdiction of this Honorable Court is invoked under 28 United States Code § 1254 (1).

Questions Presented

1. Did the Court err when it permitted, over the Defendant's objection, the prosecutor to ask the Defendant when was the first time that the Defendant had ever revealed his alibi defense?

2. Did the Court err when it admitted the record of Defendant's telephone calls, which calls occurred after the date that he was accused of committing the crime?

Statutes Involved

The statutory provisions involved are set forth in Appendix D hereto, *infra.*

Statement of the Case

The Appellant, Gary Wayne Berzonski, was indicted at the above number and term in a two-count indictment. Appellant was charged, *inter alia,* with conspiracy to violate 21 U.S.C. § 841 (A)(1) and § 846 and 18 U.S.C. § 2. In Count I of the indictment, the Appellant was charged with conspiring with one Montana Horner and a Barry (whose last name is to the Grand Jury unknown) to distribute and possess with intent to distribute approximately 10,000 tablets of lysergic acid diethylamide, commonly known as LSD. The Appellant, Berzonski, was charged in the second count of the indictment with distributing approximately 10,000 tablets of lysergic acid diethylamide.

After severance from Montana Horner, the Appellant was tried before the Court and a jury, and after such trial, was convicted of both counts.

During the trial, the testimony demonstrated that Agent Charles Harvey met with Montana Horner and after Horner made a phone call, the Appellant Berzonski came to the Horner home and delivered to Horner the LSD, as charged in the indictment. This act occurred on September 2, 1975, and the Appellant was so charged in the indictment as committing the crime and/or crimes on September 2, 1975.

The Government corroborated most, but not the identification of Defendant-Appellant, by the testimony of another Special Agent of the Drug Enforcement Agency/Joint Task Force. The Government also introduced into evidence telephone records between the homes and/or the phones of the Defendant Horner and Berzonski from the billing period of September 2, 1975, which included calls made prior to and subsequent to September 2, 1975.

The Appellant was convicted of Counts I and II of the indictment. He was sentenced under the Youthful Offenders Act to an unspecified term.

Reasons For Granting This Writ

Petitioner contends that the Court of Appeals for the Third Circuit, as well as the District Court, did not follow the dictates of *Doyle, supra.*

Your Petitioner argues that if a Defendant has the right to remain silent and such right to remain silent is Con-

stitutionally protected, then his exercise of such right cannot be used against him. This was the holding in *Doyle, supra,* and the reasons cited therein. The prosecutor asked the question and allowed the inference that, the innocent person would not remain silent, to permeate the jury box.

The second reason why the Writ of Certiorari should be granted is due to the fact that the Petitioner, Berzonski was severely prejudiced by the introduction of telephone calls between he and a Co-Conspirator. The phone calls complained of are the ones complained of after September 2, 1975, the date that the Petitioner is alleged to have committed the crime he was charged with.

There is no argument that the phone call the day prior to the 2nd and the phone call toll record of the 2nd would and could be admissible as being relevant, but any call or calls that occurred thereafter is clearly irrelevant. The District Court removed from the jury's consideration the calls prior to September 2, 1975, but allowed any and all calls subsequent to September 2, 1975. Thus, allowing the impression that there was a greater relationship by and between the Petitioner and Co-Conspirator the evidence would tend to prove.

Conclusion

It is respectfully submitted that Certiorari should be granted so that this Court can decide with finality the question of whether, either directly or indirectly, a comment can be made by the prosecution upon the Defendant's remaining silent.

Respectfully submitted,

JOHN L. DOHERTY,
DeCELLO, MANIFESTO, DOHERTY
& LOVE, P.C.,

Attorneys for Petitioner.

APPENDIX A

Opinion and Order

In The
UNITED STATES DISTRICT COURT
For The Western District of Pennsylvania

UNITED STATES OF AMERICA,

v.

GARY WAYNE BERZONSKI,

Defendant.

Criminal No. 76-32

MEMORANDUM OPINION

On June 10, 1976, defendant Gary Wayne Berzonski was convicted by a jury of conspiring to distribute, and distributing some 10,000 tablets of lysergic acid diethylamide (LSD), in violation of Sections 841(a)(1) and 846, United States Code.

Seven days later, on June 17, 1976, the United States Supreme Court decided the consolidated cases of *Doyle v. Ohio* and *Wood v. Ohio* (cited as *Doyle,* ..... U.S. ....., 49 L.Ed. 2d 91, 19 Cr. L. 3125), holding that the Fourteenth Amendment's Due Process Clause bars the government's use for impeachment purposes of an accused's silence at the time of arrest and after receipt of *Miranda* warnings (thus elevating to constitutional status the principle first announced on

evidentiary grounds in *United States v. Hale,* 422 U.S. 171 (1975)).

On June 16, and 21, 1976, defendant Berzonski moved for a new trial on grounds that, *inter alia,* a portion of the prosecution's cross-examination of him, permitted by the Court over counsel's objection, violated the constitutional prohibition soon after set forth in *Doyle.* This and other issues were subsequently argued on brief.

On July 23, 1976, I issued a written Order denying defendant's motion for a new trial. The Court takes this opportunity to address briefly that portion of the motion which relied on the due process guarantee defined by the *Doyle* Court.

At trial of the case *sub judice,* a government narcotics agent unequivocally identified defendant Berzonski as the man who on September 2, 1965, delivered a quantity of LSD to a co-conspirator's home for immediate sale to the agent. Testifying in his own behalf, defendant protested that he was at home working on the Berzonski family farm with his nephew on the date in question and therefore could not have delivered the LSD to the scene of the transaction which gave rise to his indictment.

Knowing pursuant to Rule 12.1 of the Federal Rules of Criminal Procedure (pertaining to notice of an alibi defense) that defendant intended to call his nephew as a witness to corroborate his story, the prosecutor, in an effort to show that the exculpatory story was merely a recent fabrication, asked defendant on cross-examination when he had first discussed his whereabouts on September 2, 1975 with anyone.[1] Defense

[1] It was the government's apparent intention to subsequently attempt to elicit a contradictory statement from the defendant's nephew (or another witness) as to when and if defendant talked to him with respect to his (defendant's) whereabouts on the date in question.

counsel's objection to the question was overruled after a side bar conference at which the Court specifically admonished the prosecutor to word his inquiry so as to avoid any reference to defendant's failure to relate his asserted alibi to the police at any time. The prosecutor again asked defendant when he first told anyone his whereabouts on September 2. It was subsequently submitted by defendant that, under *Doyle,* the Court committed error of constitutional proportions in permitting this question to be asked over defendant's objection.

I do not agree. The precise and rather narrow question before the *Doyle* Court was ". . . whether a . . . prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant *about his failure to have told the story after receiving Miranda warnings at the time of his arrest." Doyle, supra,* 49 L.Ed. 23 at 94 (emphasis supplied). In my view, no more than a cursory reading of *Doyle* is necessary to ascertain that the considerations underlying the Supreme Court's negative answer to that question—the insoluble ambiguity of post-arrest, post-*Miranda* warnings silence and the assurance implicit in the *Miranda* warnings that such silence will carry no penalty *(Doyle, supra,* 49 L.Ed. 2d at 97-98)—have no application to a situation in which there was neither any reference to defendant's failure to tell his exculpatory story to the police or to protest his innocence prior to trial nor any attempt by the prosecutor to impeach defendant's alibi by raising the inference that, if true, it would have been mentioned to the police at the time of defendant's arrest.

The Court of course recognizes defendant's contention that, regardless of the prosecutor's intentions, his question in

fact raised the inference prohibited by the *Doyle* Court on due process grounds. It is inconceivable, however, that the prohibited inference was the only reasonable one, or even the most likely one, that could have been drawn from the government's question.

In *Doyle,* there was direct and graphic reference to the defendant's failure to tell the police his exculpatory story at the time of his arrest. The only possible inference to be drawn by the jury was that if the defendant's story were true, he would have related it to the police at that time. In the instant case, the prosecutor's question was at worse sufficiently ambiguous to be susceptible to a variety of possible interpretations, and defendant may speculate that a prohibited interpretation was among these. Such speculation is always possible. But the mere fact that it is conceivable that the jury drew from the government's question the inference proscribed by *Doyle* is not sufficient to bring defendant's case within the protective ambit of that decision.

I have examined defendant's other contentions and find them to be without merit. For the reasons set forth above, *inter alia,* defendant's motion for a new trial was denied.

APPENDIX B.

Order of Court of Appeals

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-2122

UNITED STATES OF AMERICA,

v.

GARY WAYNE BERZONSKI,

Appellant,

(D. C. Crim. No. 76-32-3)

Appeal From the United States District Court
for the Western District of Pennsylvania

Submitted under 3rd Cir. Rule 12(6) January 7, 1977

Before VAN DUSEN and ADAMS, *Circuit Judges,*
and WEINER, *District Judge**

John L. Doherty, Esq., DeCello, Bua & Manifesto, Pittsburgh, Pa., Attorneys for Appellant.

Blair A. Griffith, U. S. Attorney; David B. Atkins, Assistant U. S. Attorney; Judith K. Giltenboth, Assistant U. S. Attorney; Pittsburgh, Pa., Attorneys for Appellee.

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* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

(1) the district court erred in permitting, over the defendant's objection, the prosecutor to ask of the defendant when was the first time he ever revealed his alibi defense;[1]

(2) the district court erred in not explaining that, because a defendant introduced evidence, the burden of proof still remains with the Government;[2]

(3) the district court erred in not dismissing the indictment on appellant's motion whenever it became obvious that the grand jury testimony of the agents had not been recorded, and, thus, denied the appellant the equal protection of the law and the effective assistance of counsel;[3] and

(4) the district court committed prejudicial error in admitting the record of Berzonski's telephone calls, which calls occurred after September 2, 1975, the date on which he was accused of having committed the crime;[4]

it is

[1] N. T. 111-13, reproduced at 18a-20a, and Memorandum Opinion of September 24, 1976, in *United States v. Berzonski*, Crim. No. 76-32 (W. D. Pa.), reproduced at 11a-13a.

[2] Court's charge at N. T. 157-61, reproduced at 35a-39a.

[3] *United States v. Crutchley*, 502 F. 2d 1195, 1200 (3d Cir. 1974).

[4] N. T. 67 reproduced at appellee's brief 12; *United States v. Grosso*, 358 F. 2d 154, 158 (3d Cir. 1966).

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Dated: JAN 12 1977.

BY THE COURT:

VAN DUSEN,
Circuit Judge.

Attest:

THOMAS (Illegible),
Clerk.

APPENDIX C

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-2122

UNITED STATES OF AMERICA,
v.
GARY WAYNE BERZONSKI,
Appellant.

(D. C. Crim. No. 76-32-3)

Present: VAN DUSEN and ADAMS, *Circuit Judges,*
and WEINER, *District Judge*

ORDER DENYING PETITION FOR REHEARING

It is ORDERED that the APPELLANT'S PETITION FOR REHEARING is denied.[1]

Dated: January 31, 1977.

BY THE COURT:

VAN DUSEN,
Circuit Judge.

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[1] The district court opinion cited in note 1 of the judgment order explains fully and in detail why the *Doyle* decision is inapplicable to the situation presented by this record.